TABLE OF CONTENTS

PAGE

Questions Presented ---------- 1

Statement ---------- 2

Summary of Argument ---------- 4

Argument ---------- 6

Conclusion ---------- 18

TABLE OF CASES

Adickes v. S. H. Kress and Company, 398 U. S. 144, 90 S. Ct. 1598, footnote 2 (1970) ---------- 14

Afro-American Pub. Co. v. Jaffe, 366 F. 2d 649, 658 (D. C. App., 1966) ---------- 8

American District Telegraph Company v. Brinks, Inc., 380 F. 2d 131 (7 Cir., 1967) ---------- 9, 15

Beckley Newspapers Corporation v. Hanks, 389 U. S. 81, 88 S. Ct. 197 (1967) ---------- 17

Bon Air Hotel, Inc. v. Time, 426 F. 2d 858 (5 Cir., 1970) ---------- 8, 16, 17

Commissioner of Internal Revenue v. Estate of Bosch, 387 U. S. 456, 462, 87 S. Ct. 1776, 1781 (1967) -- 18

Conklin v. Augusta Chronicle Pub. Co., 276 F. 288 (5 Cir., 1921) ---------- 10

Cresson v. Louisville Courier-Journal, 299 F. 487 (6 Cir., 1924) ---------- 9

Curtis Publishing Company v. Butts, 388 U. S. 130, 87 S. Ct. 1975 (1967) ---------- 9

PAGE

Dombrowski v. Pfister, 380 U. S. 479, 85 S. Ct. 1116 (1965) ---------- 17

Fidelity and Deposit Co. v. United States, 187 U. S. 315, 23 S. Ct. 120 (1902) ---------- 14

First National Bank of Arizona v. Cities Service Co., 391 U. S. 253, 288-290, 88 S. Ct. 1575, 1592-1593 (1968) ---------- 14

Fletcher v. Evening Star Newspaper Co., 114 F. 2d 582 (D. C. App., 1940), cert. den., 312 U. S. 694, 61 S. Ct. 732 (1941) ---------- 9

Galloway v. United States, 319 U. S. 372, 389-395, 63 S. Ct. 1077, 1086-1090 (1943) ------ 14

Gattis v. Kilgo, 140 N. C. 106, 52 S. E. 249 (1905), 128 N. C. 402, 38 S. E. 931 (1901) ---------- 6, 18

Goldwater v. Ginzberg, 414 F. 2d 324 (2 Cir., 1969), cert. den., 396 U. S. 1049, 90 S. Ct. 701 (1970) -- 16

Greenbelt Cooperative Publishing Association v. Bressler, 398 U. S. 6, 90 S. Ct. 1537 (1970) ------ 9

Hanks v. Beckley Newspapers Corporation, 172 S. E. 2d 816, 818 (W. Va., 1970) ---------- 17

Herndon v. Melton, 249 N. C. 217, 105 S. E. 2d 531 (1958) ---------- 6, 18

Hurley v. Northwest Publications, 273 F. Supp. 967 (D.C., Minn., 1967), affirmed, 398 F. 2d 346 (8 Cir., 1968) ---------- 9, 15

King v. Hildebrandt, 331 F. 2d 476 (2 Cir., 1964) -- 15, 16

Klein v. Belle Alkali Company, 229 F. 2d 658 (4 Cir., 1956) ---------- 16

Lawn v. United States, 355 U. S. 339, 362, 78 S. Ct. 311, 324, footnote 16 (1958) ---------- 14

PAGE

McCulloch v. Kammerer Corporation, 323 U. S. 327, 328, 65 S. Ct. 297, 298 (1945) ---------- 14

New York Times Co. v. Sullivan, 376 U. S. 254, 84 S. Ct. 710 (1964) ---------- 6, 8, 9

Phillips v. Murchison, 252 F. Supp. 513 (D.C., S.D., N.Y., 1966), affirmed in part, 383 F. 2d 370, 372 (2 Cir., 1967), cert. den., 390 U. S. 958, 88 S. Ct. 1050 (1968) ---------- 9

Pilkenton v. Kingsport Pub. Corp., 270 F. Supp. 315 (D.C., W.D., Va., 1967), affirmed, 395 F. 2d 989 (4 Cir., 1968) ---------- 15, 16

Piracci v. Hearst Corporation, 263 F. Supp. 511 (D.C., Md., 1966), affirmed, 371 F. 2d 1016 (4 Cir., 1967, memo) ---------- 15, 16

Porter v. Eyster, 294 F. 2d 613 (4 Cir., 1961) ------ 16

Pulverman v. A. S. Abell Co., 228 F. 2d 797 (4 Cir., 1956) ---------- 16

Riley v. Stone, 174 N. C. 588, 94 S. E. 434 (1917) ---- 17

Rosenbloom v. Metromedia, Inc., 415 F. 2d 892 (3 Cir., 1969) reversing 289 F. Supp. 737 (D.C., E.D., Pa., 1968); certiorari granted, 397 U. S. 904, 90 S. Ct. 917 (1970) -- 5, 6, 8, 11, 12, 13

Sellers v. Time, Inc., 399 F. Supp. 582 (D. C., E.D., Pa., 1969), affirmed, 423 F. 2d 887 (3 Cir., 1970), cert. den.,-- U.S. --, 91 S. Ct. 61 (1970) ---------- 9, 15

Thompson v. Evening Star Newspaper Co., 394 F. 2d 774 (D.C. App., 1968), cert. den., 393 U. S. 884, 89 S. Ct. 194 (1968) ---------- 15

Time, Inc. v. McLaney, 406 F. 2d 565 (5 Cir., 1969), cert. den., 395 U.S. 922, 89 S. Ct. 1776 (1969) - 15, 17

PAGE

Time, Inc. v. Pape, __ U.S.__, 91 S. Ct. 633, 39 U. S. Law Week 4270 (1971) ---------- 10, 17

United Medical Laboratories v. Columbia Broadcasting System, 258 F. Supp. 735 (D.C., Or., 1966), affirmed, 404 F. 2d 706 (9 Cir., 1968), cert. den., 394 U. S. 921, 89 S. Ct. 1197 (1969) ---------- 9, 15

Washington Post Co. v. Keogh, 365 F. 2d 965 (D. C. App., 1966), cert. den., 385 U. S. 1011, 87 S. Ct. 708 (1967) ---------- 14, 17

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56 ---------- 2, 5, 13, 14, 18

NORTH CAROLINA RULES OF CIVIL PROCEDURE

Rule 56, General Statutes of North Carolina, § 1A-1 ---------- 5, 18

SUPREME COURT RULES

Rule 23 ---------- 2, 7

TEXTS

Prosser on Torts (2d Ed.), p. 623 ---------- 6

Restatement of Torts, § 611 ---------- 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1602

BOHUN B. KINLOCH, JR.

Petitioner,

vs.

THE NEWS AND OBSERVER PUBLISHING COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

The Respondent takes exception to both questions set forth in the Petition (p. 2).

Neither question has relevance in the context of the decisions of the Courts below. The attempt of the Petitioner to state a question with federal implications or of national importance is not supported by the decisions of the Courts below.

This *diversity action* for defamation involves a newspaper report of a current proceeding before the North Carolina State Board of Alcoholic Control. (Petition, Appendix C,

p. 12A). While Respondent pleaded (a) qualified privilege under North Carolina law and (b) federal constitutional privilege "to publish reports of matters of government and public concern," the District Court rendered Summary Judgment dismissing the action upon "[T]he law of North Carolina, which controls this case, ..." (Petition, Appendix B, p. 9A, last paragraph) The District Court held that there was no material dispute on any genuine issue of fact (Petition, Appendix B, pp. 2A, 10A). The Court of Appeals affirmed, Per Curiam (Petition, Appendix C, p. 12A); rehearing denied (Petition, Appendix D, p. 13A).

No constitutional issue under the Seventh Amendment attacking Rule 56, Federal Rules of Civil Procedure (Petition, Appendix E, pp. 14A-17A) or its application, has been presented by Petitioner in either of the Courts below.

STATEMENT

The Petitioner's Statement contains certain inaccuracies, omits certain material facts, and is argumentative.

The Statement in the Petition fails to show that the basis for federal jurisdiction in the District Court was DIVERSITY, as required by Rule 23, para. 1 (g).

The statement of the case by the District Court in its Memorandum (Petition, Appendix B, pp. 2A-10A) is accurate. The statement of the Court of Appeals, Per Curiam decision, is accurate (Petition, Appendix C, p. 12A).

This diversity action is based upon alleged libelous matter in Respondent's newspaper report of proceedings before the North Carolina State Board of Alcoholic Control (hereafter ABC Board).

The newspaper article (Petition, Appendix B, pp. 3A-5A) was published on August 15, 1967 and was a current report of a hearing on August 14, 1967 (Petition, p. 2A) before

the ABC Board. The article included matters of testimony at a May 30, 1967 hearing before an ABC Board Hearing Officer, summarized in the "Findings of Fact and Recommendations" made by the Hearing Officer (Petition, Appendix B, pp. 3A-5A). That testimony related to conduct of patrons at a Raleigh nightclub owned and operated by The Scene, Ltd., a North Carolina corporation, which is not a party to this action. The stock of that corporation was owned solely by the plaintiff, who was its President. The ABC Board, on August 14, 1967, suspended the beer permit previously issued to The Scene, Ltd., and that fact was reported in the newspaper article.

At the August 14, 1967 hearing before the ABC Board, the "Findings of Fact and Recommendation" of the Hearing Officer were before the Board. The Board "approved the findings of fact as its own and made a decision thereon." There was no appeal from that decision. In writing the news article in question, the Respondent's reporter relied upon those findings of fact which summarized the testimony of the witnesses.

The District Court held that "[W]hen we examine the hearing examiner's 'Findings of Fact and Recommendations' together with such portions of the testimony which were capable of being transcribed, it reflects substantially the same information and testimony as was reported in the controversial news article." (Petition, Appendix B, p. 6A)

The District Court held that there was "no material dispute on any genuine issue of fact" (Petition, p. 2A), that the article was "substantially accurate" and "reasonably fair and complete" (Petition, p. 8A), and that there was "no issue of malice [which] could be submitted to a jury in this case." (Petition, p. 9A)

The Respondent has not alleged, nor did either Court below make a determination, that the plaintiff was a public official or a public figure.

The Respondent pleaded two affirmative defenses—(a) qualified privilege to report a quasi-judicial proceeding under North Carolina law and (b) a constitutional privilege (under the First and Fourteenth Amendments to the Constitution of the United States) "to publish reports of matters of government and public concern, including the said proceedings and records before the North Carolina Board of Alcoholic Control against The Scene, Ltd."

The District Court rendered its Summary Judgment dismissing the action upon "[T]he law of North Carolina, which controls this case, ..." (Petition, Appendix B, p. 9A, last paragraph). Respondent still contends that the Federal constitutional privilege is a valid defense, but decision below was rendered upon the rule of qualified privilege established by the law of North Carolina.

SUMMARY OF ARGUMENT

The Respondent opposes the Petition for Writ of Certiorari for the reasons summarized as follows and hereinafter more fully presented:

1. The questions in the Petition are conclusory, based upon unfounded assumptions, and include issues not raised in nor decided by the Courts below.

2. The decisions of the Courts below were rendered in a diversity action and were controlled by and based upon the law of the State of North Carolina, and, therefore, do not present questions of national importance.

3. Contrary to contentions of the Petitioner, there is no "split among the Circuits" upon issues decided by the Courts below, which involved only the question of qualified privilege to report quasi-judicial proceedings and records and the question of actual malice, even if Federal constitutional considerations entered into the decisions.

4. Any "split among the Circuits" as to the propriety of summary judgment procedure for disposing of libel actions is in the form of a proper and legitimate refusal to approve a Summary Judgment dismissing a libel action when there is a genuine issue of material fact as to the existence of actual malice, as opposed to the approval of summary dismissal of libel actions when no genuine issue of material fact is shown.

5. Contrary to the contention of the Petitioner, there is no issue as to the constitutionality of the Summary Judgment Rule 56, Federal Rules of Civil Procedure, under the Seventh Amendment, because (a) no such issue was raised in either of the Courts below, and (b) such issue is not validly raised under the facts of the present case, since there was no genuine issue of material fact for submission to a jury.

6. Contrary to contentions of the Petitioner, there was no failure of the Courts below to make an accurate statement or application of the law of North Carolina; the dismissal of this action by Summary Judgment, in the absence of a genuine issue of material fact as to the qualified privilege or as to actual malice, is in accord with North Carolina Supreme Court decisions and is sanctioned also by a Summary Judgment Rule in the North Carolina Rules of Civil Procedure containing substantially *verbatim* the provisions of Rule 56, Federal Rules of Civil Procedure.

7. Contrary to the contentions of the Petitioner concerning the potential effect upon the case at bar of a decision of this Court in *Rosenbloom v. Metromedia, Inc.*, (No. 66, Present Docket), it appears to the Respondent that a decision by this Court in *Rosenbloom* will probably not have such significance upon any issue decided by the Courts below so as to require granting certiorari herein by reason of the fact that *Rosenbloom* remains

undecided. Respondent contends that a decision affirming the Court of Appeals in *Rosenbloom* would probably provide an additional ground for sustaining the Summary Judgment in the case at bar; but a reversal in *Rosenbloom* would probably not have any material effect upon any issue decided by the Courts below in the pending case.

ARGUMENT

I.

THE DECISIONS OF THE COURTS BELOW WERE BASED UPON STATE LAW IN A DIVERSITY ACTION. THUS, THERE IS NO ISSUE OF NATIONAL SIGNIFICANCE OR IMPORTANCE.

The District Court rendered Summary Judgment for the Respondent, dismissing the action, upon "[T]he law of North Carolina, which controls this case, . . ." (Petition, p. 9A)

The Petition (p. 6) concedes with candor that "the extent to which the District Court relies upon the authority of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and related cases, does not appear with ideal clarity from the District Court's opinion; . . . ."

The District Court accurately stated and applied the rule of qualified or conditional privilege established by the Supreme Court of North Carolina (Petition, pp. 9A-10A). That rule is that the publication of a fair and accurate report of public proceedings and records before a public board is privileged although the report contains defamatory matter. *Gattis v. Kilgo,* 140 N.C. 106, 52 S.E. 249 (1905), 128 N.C. 402, 38 S.E. 931, 932 (1901); *Herndon v. Melton,* 249 N.C. 217, 105 S.E. 2d 531 (1958); see also *Prosser on Torts* (2d Ed.) p. 623; *Restatement of Torts,* § 611, comment (d).

The Petition does not challenge the District Court's state-

ment that the law of North Carolina "controls this case." Nor does the Petition take exception to the District Court's statement of the law of North Carolina on the subject of qualified privilege of reporting a quasi-judicial proceeding as a matter of public interest or on the subject of actual malice. [Petitioner does contend (p. 13) that the District Court's "disposition of the malice question without the intervention of a jury was directly contrary to the controlling state law, ..." This contention is not supported by the law of North Carolina. This point is considered later in this Brief at pages 17-18.]

The Court of Appeals in affirming, Per Curiam, the judgment of the District Court, stated that the District Court has "found that the newspaper reporter was justified, under the doctrine of conditional or qualified privilege, in relying upon the hearing examiner's report as being substantially accurate, that said report was substantially accurate, and that the published newspaper article was substantially accurate, fair and complete." (Petition, Appendix C, p. 12A)

The Petition contains no suggestion that the Court of Appeals misapplied the law of North Carolina.

Neither question in the Petition (pp. 2-3)—either in its statement or as a subsidiary question fairly comprised therein—presents an issue that State law was misstated or misapplied. Thus, that issue will not be considered by this Court. (Rule 23 (1) (c).)

The decisions of the Courts below fail to present any issue of national significance or importance or of federal implications.

II.

IF THE COURTS BELOW RENDERED THEIR DECISIONS UPON FEDERAL CONSTITUTIONAL CON-

SIDERATIONS, THERE IS NO BASIS FOR PETITIONER'S CONTENTION THAT "THIS CASE INVOLVES A CONFLICT AMONG THE CIRCUITS" WITH RESPECT TO ANY ISSUE RAISED OR DECIDED IN EITHER OF THE COURTS BELOW.

The Petitioner asserts that he is "a person who is the epitome of the private individual, and who has not thrust himself into the 'vortex' of public life, . . ." (Petition, p. 8.) The Petition (p. 3) asserts that the Petitioner "was no public figure." The implication is that the Courts below in rendering decisions against the Petitioner treated him as a "public figure" and applied the constitutional doctrines enunciated by the Supreme Court in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710 (1964) and related cases.

The Respondent has not in any pleading or brief or argument alleged or contended that the Petitioner is a public official or a public figure.

The issue of law before the District Court and the Court of Appeals was whether the Respondent's newspaper report of the proceedings and records of the State ABC Board was substantially accurate, fair and complete and whether the publication was made with actual malice.

If the District Court and Court of Appeals based their decisions upon Federal Constitutional considerations, there is, nevertheless, no basis for the Petitioner's contention that "this case involves a conflict among the Circuits" with respect to any issue raised or decided in either of the Courts below.

The Petitioner cites only four decisions in support of his contention that there is "a conflict among the Circuits": *Afro-American Pub. Co. v. Jaffe,* 366 F. 2d 649, 658 (D. C. Cir., 1966); *Rosenbloom v. Metromedia, Inc.,* 415 F. 2d 892 (3rd Cir., 1969), *Bon Air Hotel, Inc. v. Time,* 426 F. 2d

858 (5th Cir., 1970), and *United Medical Laboratories, Inc. v. Columbia Broadcasting Systems, Inc.*, 404 F. 2d 706 (9th Cir., 1968)—(Petition, p. 9).

None of those cases involved an issue of Federal constitutional privilege (or State law privilege) to report judicial or quasi-judicial proceedings or records.

At most, those cases cited by the Petitioner involved the question of whether the first amendment protection, extended to public officials in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), and to public figures in *Curtis Publishing Company v. Butts*, 388 U.S. 130, 87 S. Ct. 1975 (1967) and *Greenbelt Cooperative Publishing Association v. Bressler*, 398 U.S. 6, 90 S. Ct. 1537 (1970) applies to publications concerning "matters of public interest."

The Petitioner cites no decision of a United States Court of Appeals (or of any other court) which has failed to apply the rule of qualified or conditional privilege to a publication of a report of judicial or quasi-judicial proceedings or records.

The Federal Courts have recognized and applied the rule of qualified privilege to fair and substantially accurate reports of judicial and similar public proceedings, denying liability in the absence of actual malice. *Sellers v. Time, Inc.*, 299 F. Supp. 582, 584-585 (D.C., E.D., Pa., 1969), affirmed 423 F. 2d 887 (3 Cir., 1970), cert. den., ___ U.S. ___, 91 S. Ct. 61 (Oct. 12, 1970); *Hurley v. Northwest Publications, Inc.*, 398 F. 2d 346 (8 Cir., 1968); *Phillips v. Murchison*, 252 F. Supp. 513 (D.C., S.D., N.Y., 1966), affirmed as to counts involving report of judicial proceeding, 383 F. 2d 370, 372 (2 Cir., 1967), cert. den., 390 U.S. 958, 88 S. Ct. 1050 (1968); *American District Telegraph Company v. Brinks, Incorporated*, 380 F. 2d 131 (7 Cir., 1967); *Fletcher v. Evening Star Newspaper Co.*, 114 F. 2d 582 (D.C. App., 1940), cert. den., 312 U.S. 694, 61 S. Ct. 732 (1941); *Cresson v. Louisville Courier-Journal*, 299 F. 487 (6 Cir., 1924);

Conklin v. Augusta Chronicle Pub. Co., 276 F. 288 (5 Cir., 1921).

If the Courts below rendered their decisions upon Federal Constitutional considerations, it is respectfully submitted that such decisions are adequately supported under the decision of this Court in *Time, Incorporated v. Pape,* __ U.S. __, 91 S. Ct. 633, 39 U.S. Law Week 4270 (decided February 24, 1971), although the plaintiff in that case was admittedly a public official. There are similarities in the facts of the Pape Case and of the present case. The libel action was based upon alleged defamatory matter in a magazine news report which summarized a Report of the United States Commission on Civil Rights, containing a summary of a complaint against the libel action plaintiff in a civil rights case. The dismissal of the libel action was affirmed, notwithstanding the fact that Time Magazine quoted from the Commission's summary of the civil rights complaint against Pape, without indicating that the charges against Pape were allegations of the complaint and not independent findings of the Commission.

It is respectfully submitted that there is no conflict between the decisions of the Courts below in the present case and the decisions of any other Court of Appeals nor decisions of the Supreme Court upon the facts and the issues involved in the case at bar.

(With respect to a contention in the Petition (pp. 12-13) that there is a "split involving more than two of the circuits" as to the "procedural appropriateness" of dismissing a libel action by Summary Judgment, the Respondent's response to this contention is set forth at pages 14-17 of this Brief, in opposing the contentions made in subdivision "C" of the Petition (pp. 11-13).)

III.

EVEN IF THE SUPREME COURT SHOULD REVERSE THE DECISION OF THE COURT OF AP-

PEALS IN ROSENBLOOM v. METROMEDIA, INC. (No. 66, PRESENT DOCKET), SUCH A DECISION WOULD NOT SUPPORT THE PETITION FOR CERTIORARI HEREIN.

The Petition (pp. 10-11) asserts that if *Rosenbloom v. Metromedia, Inc.*, 415 F. 2d 892 (3 Cir., 1969) reversing 289 F. Supp. 737 (D.C., E.D., Pa., 1968); certiorari granted, 397 U.S. 904, 90 S. Ct. 917 (1970), No. 66, present docket, is decided favorably to Rosenbloom, "it would follow automatically that the Petitioner in the case at bar has been subjected to an erroneous ruling" and that "a contrary ruling in *Rosenbloom* would not necessarily be fatal to Petitioner in the case at bar, ..."

In undertaking to predict the effect of a decision before its rendition, counsel for the Petitioner has entered a realm of considerable conjecture. While such predictions are of doubtful value, counsel for the Respondent is impelled under these circumstances to submit counter observations.

The Petition (p. 11) concedes that *Rosenbloom* was disposed of by the Court of Appeals on the "public interest" doctrine. That seems clear from the Court's opinion, 415 F. 2d 892. There is nothing in that opinion to indicate that the case was disposed of by applying the rule of qualified privilege to report judicial or quasi-judicial proceedings. Although the *second* series of radio broadcasts complained of by Rosenbloom in his libel action dealt in part with a report of a judicial action, the *first* set of broadcasts related to a series of police raids on alleged distributors and sellers of obscene matter. The broadcasts referred to "smut and/or girlie-books" and contained unjustified implications concerning Rosenbloom, according to the Court of Appeals. (415 F. 2d, 894.) The defendant pleaded truth as a defense (289 F. Supp., 745). While not entirely clear from the reported decisions, it appears that Metromedia, Inc., pleaded qualified privilege to report the judicial action covered in the second series of broad-

casts. However, the District Court indicated that the defendant's conduct in "the two different sets of broadcasts" was treated "as one ball of wax." (289 F. Supp., 747.) There was no ruling by the District Court or by the Court of Appeals that the radio broadcasts were protected by any rule of qualified privilege to report such proceedings. Thus, in that respect, there is a material and significant difference between the issues involved in *Rosenbloom* and the issue involved in the case at bar.

It seems to follow that if the Supreme Court should decide that the Court of Appeals committed error in holding that the defamatory radio broadcasts in *Rosenbloom* were entitled to constitutional protection as "matters of public interest" under an extension of the *New York Times-Sullivan* doctrine, such decision would have no application to or effect upon the decisions of the Courts below that the Respondent was not liable to the Petitioner because of the rule of qualified privilege to report a quasi-judicial proceeding and because the newspaper report was substantially accurate, fair and complete and was published without actual malice.

On the other hand, if the Supreme Court should affirm the decision of the Court of Appeals in *Rosenbloom,* it would appear that in addition to its defense of qualified privilege to report a quasi-judicial proceeding, the Respondent here would be entitled to a dismissal of this libel action on the constitutional ground that the subject matter of the newspaper article was "a matter of public interest."

The suggestion in the Petition (p. 11) that the news broadcast in *Rosenbloom* was "hot" and "not ten weeks old as was the news in the case at bar" is not supported in fact. The newspaper article here was published on August 15, 1967, reporting the State ABC Board hearing held on August 14, 1967. The article reported testimony taken at a May 30, 1967 hearing and summarized in Findings of Fact which were before the ABC Board at the August 14, 1967 hearing (Peti-

tion, Appendix B, pp. 2A, 5A, 6A). Furthermore, the District Court held that the transcript of the testimony taken at the hearing and the summary of that testimony in the Hearing Officer's Findings of Fact reflected "substantially the same information and testimony as was reported in the controversial news article." (Petition, Appendix B, p. 6A)

It is respectfully submitted that a decision by the Supreme Court in *Rosenbloom* will probably not have such significance upon any issue decided by the Courts below in the pending case as to require the granting of a writ of certiorari herein by reason of the fact that *Rosenbloom* remains undecided by this Court.

IV.

THE ATTEMPT OF THE PETITIONER TO RAISE INITIALLY IN THIS COURT AN ISSUE AS TO THE CONSTITUTIONAL VALIDITY OF THE SUMMARY JUDGMENT RULE AND ITS APPLICATION TO DISPOSE OF THIS CASE COMES TOO LATE; NEVERTHELESS, THE RULE IS CONSTITUTIONAL, AND THE DISMISSAL OF THE ACTION BY SUMMARY JUDGMENT, IN THE ABSENCE OF A GENUINE ISSUE AS TO ANY MATERIAL FACT, WAS PROPER AND AFFORDS NO VALID SUPPORT FOR THE PETITION FOR CERTIORARI.

The Petitioner contends that the District Court's disposition of this action by summary judgment raises serious questions as to the proper scope to be given Rule 56, Federal Rules of Civil Procedure when it is measured against the Seventh Amendment right to jury trial and the purpose of the Rule itself. (Petition, pp. 7-8.) The Petitioner further asserts that the dismissal of the action by summary judgment raises an issue as to "the procedural appropriateness" and "the constitutional validity" of such "extraordinary device." (Petition, pp. 11-13)

The Petition (Question 2, pp. 2-3; Argument, p. 12) con-

tends that there was conflicting evidence and inferences requiring a jury trial. The Petition's statement of "facts" in support of the argument (p. 12) are not in accord with the facts as stated in the District Court's Memorandum and the determination that there was "no material dispute on any genuine issue of fact." (Petition, Appendix, pp. 2A-10A) Furthermore, the Petition (p. 12) concedes that this is not "the stuff of which successful petitions for certiorari can be composed."

It would seem that an attempt in the Petition to raise for the first time an issue concerning the constitutional validity (under the Seventh Amendment) of the Summary Judgment Rule or its appropriate application for the dismissal of this libel action comes too late. *Adickes v. S. H. Kress and Company,* 398 U.S. 144, 90 S. Ct. 1598, footnote 2 (1970; *Lawn v. United States,* 355 U.S. 339, 362, 78 S. Ct. 311, 324, footnote 16 (1958); *McCulloch v. Kammerer Corporation,* 323 U.S. 327, 328, 65 S. Ct. 297, 298 (1945).

Summary judgment is not a substitute for the trial of disputed, genuine issues of fact. A jury trial is guaranteed only when there are genuine issues of material fact. Therefore, when, as in the case at bar, there is no genuine issue of material fact, a summary judgment does not violate the Seventh Amendment. *Fidelity and Deposit Co. v. United States,* 187 U.S. 315, 23 S. Ct. 120 (1902); *Galloway v. United States,* 319 U.S. 372, 389-395, 63 S. Ct. 1077, 1086-1090 (1943); *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 288-290, 88 S. Ct. 1575, 1592-1593 (1968).

The Petitioner cites no authority for his suggestion of constitutional invalidity of summary procedure for the dismissal of libel actions.

The contention that Summary Judgment dismissing this libel action is inappropriate and unconstitutional is without merit. *Washington Post Co. v. Keogh,* 365 F. 2d 965 (D.C.

App., 1966), cert. den., 385 U.S. 1011, 87 S. Ct. 708 (1967); *Thompson v. Evening Star Newspaper Co.*, 394 F. 2d 774 (D.C. App., 1968), cert. den., 393 U.S. 884, 89 S. Ct. 194 (1968); *King v. Hildebrandt*, 331 F. 2d 476 (2 Cir., 1964); *Sellers v. Time, Inc.*, 399 F. Supp. 582 (D.C., E.D., Pa., 1969), affirmed, 423 F. 2d 887 (3 Cir., 1970), cert. den., --- U.S. --- 91 S. Ct. 61, (Oct. 12, 1970); *Piracci v. Hearst Corporation*, 263 F. Supp. 511 (D.C., Md., 1966), affirmed, 371 F. 2d 1016 (4 Cir., 1967, memo); *Pilkenton v. Kingsport Pub. Corp.*, 270 F. Supp. 315 (D.C., W.D., Va., 1967), affirmed, 395 F. 2d 989 (4 Cir., 1968); *Time, Inc. v. McLaney*, 406 F. 2d 565 (5 Cir., 1969), cert. den., 395 U.S. 922, 89 S. Ct. 1776 (1969); *American District Telegraph Company v. Brinks, Inc.*, 380 F. 2d 131 (7 Cir., 1967); *Hurley v. Northwest Publications*, 273 F. Supp. 967 (D.C., Minn., 1967), affirmed, 398 F. 2d 346 (8 Cir., 1968); *United Medical Laboratories v. Columbia Broadcasting System*, 258 F. Supp. 735 (D.C., Or., 1966), affirmed, 404 F. 2d 706 (9 Cir., 1968), cert. den., 394 U.S. 921, 89 S. Ct. 1197 (1969).

It will be observed from the foregoing decisions that summary judgments dismissing libel actions have recently been affirmed by the Court of Appeals for the Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth Circuits and for the District of Columbia. This Court denied certiorari in five of the ten cases cited.

The Courts of Appeal of the seven Circuits mentioned above and of the District of Columbia, in appropriate cases like the pending case (where there was no genuine issue of a material fact as to malice or other aspects of the cases), have not hesitated to affirm summary judgments dismissing libel actions.

Notwithstanding two libel cases cited in the Petition (p. 12) decided in 1939 and in 1941 by the Court of Appeals for the Fourth Circuit in which summary judgments were held not to

be appropriate on the facts of those cases, the decisions of the Court of Appeals, Fourth Circuit, in *Piracci, supra* (1967) and in *Pilkenton, supra* (1968), along with the decision in the case at bar, indicate no refusal of that Court to sanction summary judgment in libel cases. See also *Pulverman v. A. S. Abell Co.,* 228 F. 2d 797 (4 Cir., 1956), *Klein v. Belle Alkali Company,* 229 F. 2d 658 (4 Cir., 1956), and *Porter v. Eyster,* 294 F. 2d 613 (4 Cir., 1961), in each of which summary judgment in a libel case was approved.

The Petition (pp. 12-13) cites *Goldwater v. Ginzberg,* 414 F. 2d 324 (2 Cir., 1969), cert. den., 396 U.S. 1049, 90 S. Ct. 701 (1970), in which a motion for summary judgment dismissing an action for libel was denied. The Petitioner, on the basis of that decision, asserts that the Court of Appeals, Second Circuit, refuses "even in the case of a public figure, to sanction summary judgment where issues of actual malice were crucial." (Petition, p. 13) The Petitioner then contends, on the basis of the decision in *Ginzberg* and the decision in *Bon Air Hotel, Inc. v. Time, Inc.,* 426 F. 2d 858 (5 Cir., 1970), that there is "a split involving more than two of the circuits" on the question of whether summary judgment in libel cases is appropriate (Petition, p. 13). It is obvious from an examination of the opinions in *Ginzberg* that the evidence created a genuine issue of material fact as to the existence of actual malice. The Court of Appeals, Second Circuit, has sanctioned summary judgment dismissal of a libel action where no genuine issue of any material fact was presented. *King v. Hildebrandt,* 331 F. 2d 476 (2 Cir., 1964).

Thus, from the foregoing showing, it is respectfully submitted that the Petitioner has failed to demonstrate a "split among the Circuits" in this area of libel litigation. Any "split" has occurred upon the basis of the particular facts of particular cases—summary judgment dismissing the libel action being sanctioned when no genuine issue of any material fact was presented, but being denied when a genuine issue of fact as to actual malice was demonstrated by the plaintiff.

The Courts have held that Summary Judgment procedure is *particularly appropriate* for the disposition of actions for libel. Failure to dismiss a libel action by summary judgment in many cases would offend First Amendment principles because of the chilling effect of such litigation. *Time, Inc. v. McLaney,* 406 F. 2d 565, 566 (5 Cir., 1969), cert. den., 395 U.S. 922, 89 S. Ct. 1776 (1969); *Washington Post Company v. Keogh,* 365 F. 2d 965, 968 (D.C. App., 1966), cert. den., 385 U.S. 1011, 87 S. Ct. 708 (1967); *Bon Air Hotel, Inc. v. Time, Inc.,* 426 F. 2d 858, 864-865 (5 Cir., 1970); *cf. Dombrowski v. Pfister,* 380 U.S. 479, 85 S. Ct. 1116 (1965).

The prolonged litigation involved in *Time, Inc. v. Pape,* --- U.S. ---, 91 S. Ct. 633 (1971) illustrates the chilling effect upon First Amendment principles, as well as the time-consuming and costly experience of *Time, Inc.*

In *Beckley Newspapers Corporation v. Hanks,* 389 U.S. 81, 88 S. Ct. 197 (1967), this Court reversed a judgment for the plaintiff in a libel action, holding in effect that "the granting of a summary judgment would have been proper." *Hanks v. Beckley Newspapers Corporation,* 172 S.E. 2d 816, 818 (W.Va., 1970). The Supreme Court of Appeals of West Virginia affirmed a summary judgment dismissing the action.

Petitioner's contention that "the District Court's disposition of the malice question without the intervention of a jury was directly contrary to the controlling state law" (Petition, p. 13) is unfounded.

Under the law of North Carolina, when there is a genuine issue of material fact as to malice or any other aspect of a libel action, a jury trial is required. *Riley v. Stone,* 174 N.C. 588, 94 S.E. 434 (1917), cited in the Petition (p. 13). However, when there is insufficient evidence of actual malice, the law of North Carolina required a nonsuit or a directed verdict for the defendant under the rules of procedure in effect prior

to the new Rules of Civil Procedure (effective 1 Jan. 1970). *Herndon v. Melton,* 249 N.C. 217, 105 S.E. 2d 531 (1958); *Gattis v. Kilgo,* 128 N.C. 402, 38 S.E. 931 (1901). In *Herndon,* qualified privilege was held to be applicable and a judgment of non-suit proper, because there was "no evidence of express or actual malice." In *Gattis,* the North Carolina Supreme Court quoted with approval the following statement of law (38 S.E. at p. 935):

> ". . . . If the court decides the publication is conditionally privileged, then it is a matter of law for the court to determine whether there is any intrinsic or extrinsic evidence of malice. If the court decides the question in the negative, it directs a nonsuit, or a verdict for the defendant, without reference to the jury."

Under the new Rules of Civil Procedure, North Carolina has a Summary Judgment Rule containing substantially, *verbatim,* the provisions of Rule 56, Federal Rules of Civil Procedure. N. C. Rules of Civil Procedure, General Statutes of North Carolina, § 1A-1, Rule 56 (Effective 1 Jan. 1970) (This Brief, Appendix A).

Furthermore, this Court ordinarily accepts the determination of local law by the Court of Appeals. *Commissioner of Internal Revenue v. Estate of Bosch,* 387 U.S. 456, 462, 87 S. Ct. 1776, 1781 (1967).

The dismissal of the action by the District Court by summary judgment, in the absence of a genuine issue as to any material fact, and the decision of the Court of Appeals affirming that judgment were proper and the use of such summary procedure under the circumstances of this case is not unconstitutional and is not a valid reason for granting certiorari.

CONCLUSION

For the reasons hereinbefore stated and supported with

ample citations of authority, the Respondent earnestly urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

GENERAL STATUTES OF NORTH CAROLINA,

§ 1A-1, RULES OF CIVIL PROCEDURE

Rule 56. Summary judgment

(a) *For claimant.*—A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.*—A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.*—The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) *Case not fully adjudicated on motion.*—If on motion under this rule judgment is not rendered upon the whole

case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established.

(e) *Form of affidavits; further testimony; defense required.*—Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogations, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if apppropriate, shall be entered against him.

(f) *When affidavits are unavailable.*—Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.*—Should it appear to the

satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees. (1967, c. 954, s. 1.)—Effective 1 Jan. 1970.